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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. —

UNITED STATES OF AMERICA, PETITIONER

v.

PAUL TANNER

UNITED STATES OF AMERICA, PETITIONER

v.

ELIZABETH RUTH PAUL, EXECUTRIX OF THE ESTATE OF EARLE EVARTS PAUL, DECEASED

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

The Solicitor General, on behalf of the United States, prays that writs of certiorari issue to review the judgments of the United States Court of Claims entered in the above cases on May 3, 1955.

OPINIONS BELOW

The opinion of the Court of Claims in both cases (R. 97–103) is reported at 125 F. Supp. 240.

JURISDICTION

The judgments of the Court of Claims were entered on May 3, 1955 (R. 107–108). The jurisdiction of this Court is invoked under 28 U. S. C. 1255 (1).

QUESTION PRESENTED

Whether retired Army reserve officers may receive both retired pay and government civilian pay which together amount to more than $3,000 a year.

STATUTES INVOLVED

Section 212 (a) of the Economy Act of 1932 (47 Stat. 406) provides in material part as follows (5 U. S. C. 59a (a)):

> After [June 30, 1932], no person holding a civilian office or position, appointive or elective, under the United States Government * * * shall be entitled, during the period of such incumbency, to retired pay from the United States for or on account of services as a commissioned officer in any of the services mentioned in the Pay Adjustment Act of 1922 [U. S. C., title 37], at a rate in excess of an amount which when combined with the annual rate of compensation from such civilian office or position, makes the total rate from both sources more than $3,000; and when the retired pay amounts to or exceeds the rate of $3,000 per annum such person shall be entitled to the pay of the civilian office or position or the retired pay, whichever he may elect.

> As used in this section, the term "retired pay" shall be construed to include credits for all service that lawfully may enter into the computation thereof.

The Act of July 1, 1947 (61 Stat. 238), provides as follows (10 U. S. C. 1946 Ed. 371, 371b):

> All officers and employees of the United States or of the District of Columbia who shall be members of the Officers' Reserve Corps or the Enlisted Reserve Corps shall be entitled to leave of absence from their respective duties, without loss of pay, time, or efficiency rating, on all days during which they shall be ordered to active duty for training, or active duty, or to duty with troops or at field exercises, or for instruction for periods not to exceed fifteen days in any one calendar year: *Provided,* That members of the Officers' Reserve Corps or the Enlisted Reserve Corps who are in the employ of the United States Government or of the District of Columbia and who are ordered to duty by proper authority shall, when relieved from duty, be restored to the positions held by them when ordered to duty.
>
> No existing law shall be construed to prevent any member of the Officers' Reserve Corps or the Enlisted Reserve Corps from accepting employment in any civil branch of the public service nor from receiving the pay incident to such employment in addition to any pay and allowances

to which he may be entitled under the laws relating to the Officers' Reserve Corps or the Enlisted Reserve Corps, nor as prohibiting him from practicing his civilian profession or occupation before or in connection with any department of the Federal Government.

Title III, Sec. 302 (a), of the Act of June 29, 1948 (62 Stat. 1081, 1087, 10 U. S. C. 1036a), provides:

> Any person who, upon attaining or having attained the age of sixty years, has performed satisfactory Federal service as defined in this section in the status of a commissioned officer, warrant officer, flight officer, or enlisted person in the Army of the United States or the Air Force of the United States, including the respective reserve components thereof, * * * and has completed an aggregate of twenty or more years of such satisfactory service in any or all of the aforesaid services, shall, upon application therefor, be granted retired pay * * *.

STATEMENT

In these cases, respondents, retired Army reserve officers employed by the United States in civilian capacities before and since their retirement, seek retired Army pay from the date on which they were placed on the reserve retired list. While the identical question is presented in each case, the underlying facts differ; accordingly, they are separately stated.

1. ADMINISTRATIVE PROCEEDINGS PRIOR TO RESPONDENTS' RETIREMENT

Tanner—On May 26, 1952, Tanner, who had been commissioned as an Army reserve officer in 1917 (R. 2), applied to the Adjutant General of the Army to be placed on the retired list with entitlement to retired pay under the Act of June 29, 1948, *supra,* p. 4 (R. 2). At the time he applied for Army retirement, Tanner was employed by the United States as a Department of the Army production specialist with a salary of $5,625 per year and at the time of suit his salary was $5,720 per year (R. 2). On July 15, 1952, the Army Finance Office informed Tanner that he was entitled to retired pay of $159.50 per month subject, however, to the dual salary restriction of Section 212 of the Economy Act of 1932, *supra,* p. 2, which limits combined civilian compensation and retirement pay for commissioned service to $3,000 per year (R. 3). Tanner was advised that when the annual rate of civilian compensation paid by the United States is $3,000 or more and the annual rate of retirement is less than $3,000, the Economy Act compels waiver of retirement pay and full payment of the civilian salary (R. 3). The Army placed Tanner on the retired list on June 26, 1952 (R. 2), but, observing the prohibition of the Economy Act, refused him retirement pay since he was then, and is now, earning in excess of $3,000 per year (R. 3).

Paul—Earle Evarts Paul,[1] a commissioned officer in the Officers Reserve Corps (R. 10), was placed, upon his application, on the Army of the United States retired list on June 29, 1948 (R. 10). At the time of his Army retirement, Paul was employed by the United States in a civilian capacity in the Veterans Administration, where he earned $9,600 per year (R. 10). Like Tanner, Paul was advised by the Army that his retired pay under the Act of 1948 was subject to the dual salary restrictions of the Economy Act and that, since he was earning in excess of $3,000 per year, he was not entitled to retired pay (R. 11).

2. JUDICIAL PROCEEDINGS

Tanner, on September 24, 1953 (R. 1), and Paul, on January 29, 1954 (R. 9), brought suit in the Court of Claims to recover retired pay allegedly due and owing from their dates of retirement. They contended that the Act of 1947, *supra,* p. 3, exempted retired Army reserve officers from the dual salary restrictions of the Economy Act by entitling them to receive as "pay and allowances" retired pay on account of Army service in addition to pay for their civilian employment. The court below, although noting that at the time of the enactment of the Act of 1947 there was no retired pay for reserve Army

[1] Paul died on January 14, 1953. His widow brought this action in the court below as executrix of the estate (R. 10).

officers for age or length of service (R. 102),[2] held that "The text of [the Act of 1947] has a fairly plain meaning. 'Pay and allowances' of a Reserve officer would naturally include his retired pay * * *" (R. 103) and, accordingly, granted respondents' motion for summary judgment.

REASONS FOR GRANTING THE WRITS

1. The court below in these cases has interpreted the language of a statute simply designed to protect government-employed reservists for the 15-day period of annual training to apply to the entire period of their retirement from military service. In doing so, it has found that retired *reserve* officers employed by the government are entitled to double pay even though that right is admittedly denied to retired *regular* officers. The opinion thus throws into utter confusion the relationship between the retirement provisions for regular and reserve officers. And although in these cases Army officers are involved, the court below reached the same result with respect to the Air Force, and the reasoning of the opinion is equally applicable to the Navy, the Marine Corps and the Coast Guard. In fact, it raises a question with respect to the retired pay of every retired

[2] It was not until the passage of Title III of the Act of June 29, 1948 (62 Stat. 1081, 1087, 10 U. S. C. 1036 *et seq.*), *supra*, p. 4, that Army reserve officers were eligible for retired pay on account of age or length of service.

reserve officer in any of the services who has taken government employment.

While it has not been possible to secure a complete estimate as to the number of individuals who may be affected by the decision of the court below, partial estimates indicate that there are at present at least 3,000 potential claimants for entitlement to retired pay under the decision. There are already pending in the Court of Claims 16 actions brought on behalf of 60 Army and Air Force officers and 7 actions brought on behalf of 128 Navy reservists, representing a potential liability of at least $800,000 on the part of the United States. The full liability would probably amount to several millions.

2. The Act of July 1, 1947 (*supra*, p. 3), on the basis of which the court below rested its curious conclusion, was designed to amend certain existing laws [3] so as to give Army reserve enlisted

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[3] Principally:

The Act of May 12, 1917, 40 Stat. 40, 72, 10 U. S. C. 1946 Ed. 371:

"All officers and employees of the United States or of the District of Columbia who shall be members of the Officers' Reserve Corps shall be entitled to leave of absence from their respective duties, without loss of pay, time, or efficiency rating, on all days during which they shall be ordered to duty with troops or at field exercises, or for instruction, for periods not to exceed fifteen days in any one calendar year: *Provided further*, That members of the Officers' Reserve Corps who are in the employ of the United States Government or of the District of Columbia and who are ordered to duty by proper

men, who were government employees, the same rights to leave of absence from their civilian duties as were already enjoyed by Navy reservists and Army reserve officers.[4] As stated in the House hearing on H. R. 1845 (which later became the Act of July 1, 1947):

> The purpose of the proposed bill is to authorize military leave with pay for

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authority shall, when relieved from duty, be restored to the positions held by them when ordered to duty."

Section 80 of the Act of June 3, 1916, 39 Stat. 166, 203, 32 U. S. C. 1946 Ed. 75:

"All officers and employees of the United States and of the District of Columbia who shall be members of the National Guard shall be entitled to leave of absence from their respective duties, without loss of pay, time, or efficiency rating, on all days during which they shall be engaged in field or coast-defense training ordered or authorized under the provisions of this title."

Section 9 of the Naval Reserve Act of 1938, 52 Stat. 1175, 1177, 34 U. S. C., 1946 Ed. 853g:

"* * * That all officers and employees of the United States or of the District of Columbia who are members of the Naval Reserve shall be entitled to leave of absence from their respective duties without loss of pay, time, or efficiency rating, on all days during which they may be employed with or without pay under the orders or authorization of competent authority, on training duty for periods not to exceed fifteen days in any one calendar year."

[4] The Act was entitled: "An Act to amend existing laws relating to military leave of certain employees of the United States or of the District of Columbia so as to equalize rights to leave of absence and reemployment for such employees who are members of the Enlisted or Officers' Reserve Corps, the National Guard, or the Naval Reserve, and for other purposes."

periods not to exceed 15 days annually for members of the *Army Enlisted Reserve Corps* employed by the Federal Government or the District of Columbia who are ordered to training duty in the Enlisted Reserve Corps. * * *

Employees of the United States or of the District of Columbia who are members of the Army Officers' Reserve Corps are entitled to the same military leave and reemployment rights under the Act of May 12, 1917 (40 Stat. 72; 10 U. S. C. 371) *as would be provided* for members of the Enlisted Reserve Corps by the proposed bill. Members of the Naval Reserve are entitled to military leave of 15 days annually under section 9 of the Naval Reserve Act of 1938 (52 Stat. 1177; 34 U. S. C. 853g) * * *.

* * * * *

Members of the Reserve Corps of the Army who are officers are entitled to 15 days leave with pay each year in order to train. Officers and enlisted men of the Naval Reserve are also entitled to that leave with pay. But enlisted men of the Army Reserve Corps are not entitled to that pay.

It was the purpose of H. R. 1845 to bring the enlisted men of the Army Reserve Corps up to the same status as officers of that corps and up to the same status as enlisted men of the Naval Reserve.[5] [Emphasis supplied.]

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[5] Subcommittee Hearings on H. R. 1845 to amend Section 371, Title 10, United States Code (Military Leave for Federal Employees), 80th Congress, House Committee On

With the enactment of H. R. 1845, the leave status of Army enlisted reservists was assimilated to that of Army commissioned reservists and Navy reservists, both enlisted and commissioned. All service reserves were given equal rights to job restoration on their return from temporary training duty.

In this context of granting equal leave status to enlisted men and of assuring to all reserve personnel restoration of their jobs on return from military duty, Congress further provided in Section 1b of the Act of 1947 that all reservists should be entitled to receive both their civilian compensation and military pay and allowances. Reading Sections 1a and 1b together, it is apparent that Congress intended to permit all reservists the same right to leave of absence for 15 days of military duty and to receive *for that military duty* pay and allowances in addition to civilian salary.

The Act's legislative history affirmatively indicates that the right of reservists to collect pay and allowances for military duty in addition to civilian compensation was intended by Congress to be limited to the right to collect only for 15 days of active duty training. In reporting its estimate of the cost of H. R. 1845, the House Committee on Armed Services stated:

Armed Services, Hearings, Vol. II, p. 2239, 2241–2242 [No. 139], May 19, 1947. See also House Report 483, 80th Cong., 1st Sess., p. 2; 27 Comp. Gen. 245, 247.

> The fiscal effects of this bill cannot be computed accurately since the number of enlisted reservists employed by the Federal Government or the District of Columbia who will partake in voluntary periods of training cannot be estimated accurately. A statistical solution, based on percentage of the male labor force employed by the Government, estimates the annual cost of salaries paid *while the enlisted reservists are on active duty will be $1,546,800. When the reserve training program has been fully implemented, continuing from a practical standpoint, the cost of this program would not even approximate the sum mentioned, since the Government must spend an equal sum on persons in other positions who would perform the same type of training and service.* Otherwise the entire training program would fail. Many reservists are in civil service and the Government desires that they be made available for the 15-day training period. If these persons are not available, it becomes necessary for the Government to obtain persons from some other source. [House Report No. 483, 80th Cong., 1st Sess., p. 3. (Emphasis supplied.)]

This statement refers, very logically, to the fiscal effects of paying enlisted reservists for 15 days of active duty. As has been noted above, H. R. 1845 was primarily concerned with equalizing the status of enlisted reservists; Army reserve officers gained no new benefits from Section 1a of the bill.

It is inconceivable, therefore, that in a bill to equalize the status of enlisted active reserve men, Congress, granting the privilege to all active reservists of receiving both civilian salary and active duty pay, would give retired reserve personnel alone * the unprecedented right annually to collect 12 months of retired pay and 12 months civilian salary.

Congress itself has not considered the 1947 Act as exempting reservists from the dual compensation statute. In the course of considering the Reserve Retirement Act in 1948, the question arose as to the right of reservists to double salary and it was clear that the Congressional spokesman for the measure did not believe that the provision of the Economy Act had been repealed. The following debate took place in the House of Representatives (94 Cong. Rec. 2483):

> Mr. MUHLENBERG. Is there anything in the bill that prevents duplication of pensions? For instance, a Reserve officer might be receiving a pension under another form of Federal security.
>
> Mr. JOHNSON of California. No; there is nothing that prevents that.
>
> Mr. MUHLENBERG. In the opinion of the chairman, would that be a wise provision to have in the bill?

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* Retired regular Army and Navy officers employed by the United States in civilian capacities may not receive both retired pay and civilian salary if the combined total exceeds $3,000. 5 U. S. C. 59a.

Mr. JOHNSON of California. Does the gentleman mean to prevent duplication?

Mr. MUHLENBERG. Yes.

Mr. JOHNSON of California. Frankly, I do not know what situation the gentleman has in mind, and I do not want to give him answer unless I have an idea of what he is talking about.

Mr. MUHLENBERG. A man in Federal service might be a civilian employee.

Mr. JOHNSON of California. *With respect to the Federal service there is another law that prohibits for dual payments in certain cases. If a man gets over $3,000, he cannot get anything under this bill. That applies to Army officers, and I think that is a good rule.* At least we cannot change it in this legislation. [Emphasis added.]

3. There is an additional reason why the construction of the Act of 1947 adopted by the court below is erroneous. Retired reserve officers, at the time of passage of the Act of 1947, were not entitled to retired pay and they did not become so entitled until June 29, 1948. Thus, it seems plain that when Congress provided in the Act of 1947 that "No *existing* law should be construed to prevent any member of the Officers Reserve Corps * * * from receiving * * * pay and allowances to which he may be entitled under the laws relating to the Officers Reserve Corps" [emphasis added], it could only have been viewing "pay and allow-

ances" as active duty "pay and allowances." Congress cannot be presumed to have been dealing in 1947 with a right which it did not create until 1948, particularly when its 1947 legislation refers to "no *existing* law." Furthermore, as we have noted *supra*, pp. 13–14, when Congress, well aware of the existence of the Act of 1947,[7] enacted the bill giving reserve officers the right to retired pay, it was stated on the floor, without hesitation and in unequivocal terms, that the right was subject to dual salary restrictions.

In summary, both the structure of the statute and its legislative history indicate that it was intended to give all reservists, regardless of service or rank, the right to receive, in addition to civilian salary, military pay for 15 days of active duty and *no more than that.* In the area of military pay and status legislation, Congress has always acted with the greatest specificity and exactitude. Had Congress intended to grant the special privilege which respondents claim, it would have done so by explicit language and openly declared its purpose. We submit that nothing in the history, language, or purpose of the Act of 1947, gives, either expressly or by implication, to respondents or other retired reserve officers a valuable right not possessed by regular military personnel.

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[7] See 94 Cong. Rec. at 2484.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for writs of certiorari should be granted.

SIMON E. SOBELOFF,
Solicitor General.
WARREN E. BURGER,
Assistant Attorney General.
SAMUEL D. SLADE,
SONDRA K. SLADE,
Attorneys.

JULY 1955.

APPENDIX

In the United States Court of Claims

(Decided November 2, 1954)

No. 543–53

PAUL TANNER v. THE UNITED STATES

No. 38–54

CHARLES C. ADAMS, ET AL. v. THE UNITED STATES

No. 39–54

ELIZABETH RUTH PAUL, EXECUTRIX OF THE ESTATE OF EARLE EVARTS PAUL v. THE UNITED STATES

Mr. Burr Tracy Ansell for the plaintiffs.

Mr. Kendall M. Barnes, with whom was *Mr. Assistant Attorney General Warren E. Burger*, for the defendant.

ON DEFENDANT'S AND PLAINTIFFS' MOTIONS FOR SUMMARY JUDGMENT

MADDEN, *Judge*, delivered the opinion of the court:

Each of these three cases involves the question whether an Army Reserve or Air Force Reserve officer on the Retired List, who is otherwise entitled to receive retired pay, may receive such pay if he holds civilian employment with the Government for which he is paid $3,000 or more per year.

Section 212 of the Economy Act of June 30, 1932, 47 Stat. 406, as amended in 1940, 54 Stat. 761, provides in material part as follows:

(a) After the date of the enactment of this Act, no person holding a civilian office or position, appointive or elective, under the United States Government * * * shall be entitled, during the period of such incumbency, to retired pay from the United States for or on account of services as a commissioned officer in any of the services mentioned in the Pay Adjustment Act of 1922 [U. S. C., Title 37], at a rate in excess of an amount which when combined with the annual rate of compensation from such civilian office or position, makes the total rate from both sources more than $3,000; and when the retired pay amounts to or exceeds the rate of $3,000 per annum such person shall be entitled to the pay of the civilian office or position or the retired pay, whichever he may elect. As used in this section, the term "retired pay" shall be construed to include credits for all service that lawfully may enter into the computation thereof.

(b) This section shall not apply to any person whose retired pay, plus civilian pay, amounts to less than $3,000: *Provided*, That this section shall not apply to regular or emergency commissioned officers retired for disability incurred in combat with an enemy of the United States or for disabilities resulting from an explosion of an instrumentality of war [5 U. S. C. 59a] in line of duty * * *.

The Act of July 1, 1947, 61 Stat. 238, 10 U. S. C. 371 and 371 (b) provides:

371. All officers and employees of the United States or of the District of Columbia who shall be members of the Officers' Reserve Corps or the Enlisted Reserve Corps shall be entitled to leave of absence from their respective duties, without loss of pay, time, or efficiency rating, on all days during which they shall be ordered to active duty for training, or active duty, or to duty with troops or at field exercises, or for instruction, for periods not to exceed fifteen days in any one calendar year: *Provided further*, That members of the Officers' Reserve Corps or the Enlisted Reserve Corps who are in the employ of the United States Government or of the District of Columbia and who are ordered to duty by proper authority shall, when relieved from duty, be restored to the positions held by them when ordered to duty.

371 (b). No existing law shall be construed to prevent any member of the Officers' Reserve Corps or the Enlisted Reserve Corps from accepting employment in any civil branch of the public service nor from receiving the

> pay incident to such employment in addition to any pay and allowances to which he may be entitled under the laws relating to the Officers' Reserve Corps or the Enlisted Reserve Corps, nor as prohibiting him from practicing his civilian profession or occupation before or in connection with any department of the Federal Government.

The Officers' Reserve Corps named in the statute was the Officers' Reserve Corps of the Army.

Title III of the Act of June 29, 1948, 62 Stat. 1087, 10 U. S. C. 1036, *et seq.*, authorized retired pay for Reserve officers of the Army who have reached the age of 60 and have had 20 or more years of satisfactory service.

The above-quoted provision of the Economy Act of 1932 expressly prohibits what the plaintiffs ask for. Unless that prohibition was nullified by the above quoted Section 371 (b) of the 1947 statute, the plaintiffs cannot prevail. The plaintiffs say that it was so nullified. They say that the retired pay which the 1948 statute authorizes for them is "pay and allowances to which [they] may be entitled under the laws relating to the Officers' Reserve Corps," within the meaning of the 1947 statute.

There is no problem here of a repeal of the 1932 Act by implication. The 1947 statute is express that "No existing law shall be construed to prevent" the receipt of the pay and allowances therein referred to. Our problem is to determine whether the expression "pay and allowances" includes the retired pay authorized by the 1948 Act.

Congress probably did not have retired pay for Reserve officers specifically in mind when it enacted the 1947 Act, since no such pay was available for Reserve officers on the basis of mere length of service until it was provided in the 1948 Act. There was no discussion of the 1947 Act on the floor of either House of Congress. In the House Committee, Captain Nunn of the Navy, having been called on for an explanation of Section 1 (b), quoted above from the 1947 Act, said:

> Subsection 1 (b) gives members of both Enlisted and Officers' Reserve Corps the same right to reemployment in any civil branch of the public service, to receive pay and allowances incident to such employment in addition

to pay and allowances they may be entitled to, and to practice civil professions or occupations before or in connection with any department of the Federal Government. It gives them those rights that naval reservists now have under the last provision of Section 4 of the Navy Reserve Act of 1938 and that the National Guard men will get under section 2 of the proposed bill.[1]

Section 4 of the Naval Reserve Act of 1938, 52 Stat. 1176, contained, with reference to the Naval Reserve, language similar to that of Section 1 (b) of the 1947 Act. It was, however, limited in a respect, the significance of which appears hereinafter.

The parties have urged upon us various rulings of the Comptroller General of the United States as showing the background against which the legislation in question should be projected, to ascertain the Congressional intent, and also as showing the administrative interpretation of the legislation, after its enactment.

On January 11, 1946, 25 Comp. Gen. 521, the Assistant Comptroller General ruled that in view of the express provisions of Section 4 of the Naval Reserve Act of 1938, referred to above, a retired member of the Naval Reserve could draw retired pay, computed in part on the basis of service as a commissioned officer, and at the same time hold a Government civilian position paying $3,750 a year. This ruling is strongly urged upon us by the plaintiffs.

On October 28, 1946, 26 Comp. Gen. 271, the Comptroller General ruled that a retired enlisted man of the Regular Navy, who, under the Act of February 21, 1946, 60 Stat. 26, was entitled to have his retired pay computed on the basis of a commissioned officer rank which he had held when he was recalled to active service from an earlier retirement, was subject to the provisions of Section 212 of the Economy Act of 1932. We have said above that there was an important difference between Section 4 of the Naval Reserve Act of 1938, and Section 1 (b) of the 1947 Act here in question, which applied to Reserve Officers of the Army. Section 4 of the 1938 Act said that no existing law should be construed to prevent a member of the Naval Reserve from holding a

[1] Hearings before Subcommittee No. 11, Legal, Committee on Armed Services, on H. R. 1845, 80th Cong., 1st Sess. [No. 139], Transcript, p. 2243.

civilian position with the Government and receiving the pay of that position in addition to any pay and allowances to which he might be entitled "under the provisions of this Act", *i. e.*, the 1938 Act. The exemption from Section 212 was therefore not applicable to pay and allowances of a Reserve officer granted by legislation other than the 1938 Act. In the 26 Comp. Gen. 271 case, the retired pay in question was granted by the Act of February 21, 1946, hence the exemption was not applicable. The Comptroller General in his opinion suggested comparison with the earlier ruling in 25 Comp. Gen. 521. Comparison shows that in that case the pay and allowances in question were granted under the 1938 Act, and the ruling was that the exemption from Section 212 applied.

On March 13, 1947, 26 Comp. Gen. 674, the Comptroller General ruled that the pay of a Naval Reserve officer for flights made on inactive duty training could be collected, in addition to the pay of a civilian Government position held by the Reserve officer. The Comptroller General did not mention Section 212 and it is obviously not applicable, since it relates only to *retired pay*. The Comptroller General's unspecified reference to "dual compensation" laws was probably to 5 U. S. C. 58 and 5 U. S. C. 62, not involved in this case.

On December 17, 1948, 28 Comp. Gen. 367, the Comptroller General ruled on the very question which is before us, *i. e.*, whether an Army Reserve officer might receive retired pay in addition to his civilian Government pay, the latter being in excess of $3,000. The ruling was that he might not. The Comptroller General said he had not found any provision of law exempting such officers from Section 212 of the 1932 Economy Act. He did not mention the 1947 Act, here under consideration, and it must be that he was not, at the moment, aware of it, since it was obviously at least arguably applicable.

On April 19, 1949, 28 Comp. Gen. 588, the Comptroller General ruled that a Naval Reserve officer receiving retired pay under Title III of the Act of June 29, 1948, was subject to Section 212. He pointed out that Section 4 of the 1938 Act granted exemption only for pay and allowances to

which an officer was entitled under the provisions of that Act, *i. e.*, the 1938 Act, hence the exemption was not applicable to retired pay granted by the 1948 Act. It may be inferred from the Comptroller General's discussion that if the retired pay in question had been granted by the 1938 Act, the ruling would have been the same as that in 25 Comp. Gen. 521, *i. e.*, in favor of the exemption.

Decisions of June 24, 1949, 28 Comp. Gen. 727, and May 29, 1952, 31 Comp. Gen. 619, relate, respectively, to an officer of the Regular Army and an officer of the Regular Navy. The legislation involved in our cases applies only to Reserve officers, hence these rulings are not in point.

The Comptroller General's ruling in 25 Comp. Gen. 521, was squarely in favor of the position taken by the plaintiffs in this case. His ruling in 28 Comp. Gen. 367, was squarely against the plaintiffs' position, but he was, apparently, unaware of the statute on which the plaintiffs rely. His language in 28 Comp. Gen. 588, indicated that he still adhered to his position taken in 25 Comp. Gen. 521. We do not find in the Comptroller General's opinions a consistent course of administrative construction which helps us to interpret the statute.

Nor do we find anything really helpful in the legislative history of the statute. It will be remembered that at the time of its enactment in 1947 there was, generally speaking, no retired pay for Reserve Army officers for age or length of service. When Title III of the Act of June 29, 1948, *supra*, which gave retired pay to Reserve officers of the Army for length of service was under discussion on the floor of the House of Representatives, Representative Johnson, Chairman of a Subcommittee of the Committee on Armed Services, in explanation of the bill, stated categorically that the Economy Act of 1932 would be applicable to retired pay received pursuant to the bill. 94 Cong. Rec. pp. 2481–2483.

In the 83d Congress, Public Law 300, approved February 20, 1954, amended Section 212 of the Economy Act of 1932 broadening its exemption relating to officers retired for disability [68 Stat. 18]. The Government points to language in Senate Report No. 885, 83d Congress, 2d Session, saying that "under the present law, retired commissioned officers are pro-

hibited from receiving both military retired pay and pay as a civilian employee of the Government if such combined amounts exceed $3,000 per annum * * *," except in case of retirement for disability. This statement was certainly true of Regular Army officers, and the Committee may, in making it, have been unaware of the problem of the instant litigation with regard to Reserve officers. The statement does not seem to us to show that the Committee had definite views as to our problem.

The Government points out that if the plaintiffs' interpretation of the 1947 Act were correct, Reserve officers would enjoy an important privilege not available to retired officers of the Regular Army. The plaintiffs' answer is that the retired pay of Reserve officers, merely for length of service, is only a small fractional part of the retired pay of officers of the Regular Army.

The text of the statute in question has a fairly plain meaning. "Pay and allowances" of a Reserve officer would naturally include his retired pay, if Congress provided retired pay for him. There is not enough, of significance, in the administrative and Congressional treatment of the statute to persuade us to depart from the natural meaning of the words of the statute.

The defendant's motion for summary judgment is denied, and the plaintiffs' motion is granted. Entry of judgment will be suspended to await the filing of a report by the General Accounting Office showing the amounts due the plaintiffs.

It is so ordered.

LARAMORE, *Judge;* WHITAKER, *Judge;* LITTLETON, *Judge;* and JONES, *Chief Judge*, concur.

In the United States Court of Claims

No. 543–53

PAUL TANNER

v.

THE UNITED STATES

ORDER

On November 2, 1954, the court rendered an opinion holding that plaintiff was entitled to recover but suspended the entry of judgment pending the filing of a report by the General Accounting Office showing the amount due plaintiff in accordance with the court's decision.

On April 19, 1955, said report by the General Accounting Office was filed in which it is stated that in accordance with the court's decision there is due plaintiff the sum of $4,523.50 for the period July 1, 1952 to November 2, 1954.

Now, therefore, it is ordered this third day of May 1955, that judgment be and the same hereby is entered in favor of plaintiff in the sum of four thousand five hundred twenty-three dollars and fifty cents ($4,523.50), representing the amount due plaintiff for the period July 1, 1952 to November 2, 1954.

By THE COURT,

MARVIN JONES, *Chief Judge.*

In the United States Court of Claims

No. 39–54

ELIZABETH RUTH PAUL, EXECUTRIX OF THE ESTATE OF EARLE EVARTS PAUL

v.

THE UNITED STATES

ORDER

On November 2, 1954, the court rendered an opinion holding that plaintiff was entitled to recover but suspended the entry of judgment pending the filing of a report by the General Accounting Office showing the amount due plaintiff in accordance with the court's decision.

On April 19, 1955, said report by the General Accounting Office was filed in which it is stated that in accordance with the court's decision there is due plaintiff the sum of $3,747.37 for the period June 29, 1948 to January 14, 1953.

Now, therefore, it is ordered this third day of May 1955, that judgment be and the same hereby is entered in favor of plaintiff in the sum of three thousand seven hundred forty-seven dollars and thirty-seven cents ($3,747.37), representing the amount due plaintiff for the period June 29, 1948 to January 14, 1953.

By THE COURT,
MARVIN JONES, *Chief Judge.*

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 280

UNITED STATES OF AMERICA, *Petitioner*

v.

PAUL TANNER

UNITED STATES OF AMERICA, *Petitioner*

v.

ELIZABETH RUTH PAUL, Executrix of the Estate of Earle Evarts Paul, Deceased

On Petition for Writs of Certiorari to the United States Court of Claims

BRIEF FOR RESPONDENTS IN OPPOSITION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 280

UNITED STATES OF AMERICA, *Petitioner*

v.

PAUL TANNER

UNITED STATES OF AMERICA, *Petitioner*

v.

ELIZABETH RUTH PAUL, Executrix of the Estate of Earle Evarts Paul, Deceased

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On Petition for Writs of Certiorari to the United States Court of Claims

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BRIEF FOR RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Claims in both cases (R. 97-103; Appendix to Petition, 19) is reported at 129 C. Cls. 792 and also at 125 F. Supp. 240.

JURISDICTION

The petition for writs of certiorari was not filed within the time allowed by law. In respect of matters

such as these, 28 U.S.C. § 2101(c) provides that application for the writ must be made "within ninety days after the entry of such judgment". The filing of a timely motion for rehearing operates to extend the time to ninety days following its denial. See *Department of Banking* v. *Pink*, 317 U.S. 264, 266.

In these cases, the Court of Claims rendered its opinion on November 2, 1954 (R. 97; App. to Petition, 19). The opinion granted the respondents' motion for summary judgment and denied the petitioner's motion therefor (R. 103; App. to Petition, 25). Notations to that effect were made in the court's docket that day (Appendix A, *infra*).[1] After rendition of the court's opinion, there remained only the computation of the amounts of retired pay which the respondents should recover in accordance with the opinion. The Court of Claims therefore suspended the entry of judgment to await reports by the General Accounting Office showing the amount due the respondents (R. 103; App. to Petition, 26, 27). In the meanwhile, the petitioner filed a motion for rehearing (styled "motion for reconsideration") which the court denied February 8, 1955 (R. 105). On April 19, 1955, the General Accounting Office reported the amounts due the respondents (R. 107-109; App. to Petition, 26, 27). On May 3, 1955, the court entered formal judgment for the respondents in the amounts reported by the General Accounting Office R. 107-109; App. to Petition, 26, 27).

The respondents say that the opinion of November 2, 1954, was the judgment of the Court of Claims and

[1] No reference to these docket entries is contained in the certified record filed with the Court by the petitioner. The respondents have copied the entries from the docket of the Court of Claims and reproduced them in Appendix A hereto.

that the rendition of the opinion on that day constituted the entry of such judgment for the purpose of initially fixing the time within which a petition for the writ is required to be filed as provided by 28 U.S.C. § 2101(c). "The judgment of a court is the judicial determination or sentence of the court upon a matter within its jurisdiction. No form of words and no peculiar formal act is necessary to evince its rendition or to mature the right of appeal." *United States* v. *Hark*, 320 U.S. 531, 534.

The entry of the court's opinion on November 2, 1954, resolved the single issue in these cases by granting the respondents' motion for summary judgment. The record shows that the whole controversy here is whether the respondents may receive retired pay at all. There has never been any dispute as to the amount of such pay they should receive, once their right to receive pay has been established. The computation of the extent of their recovery, assuming that they are entitled to recover, is a simple act governed by explicit provisions of statute similarly applied day after day by finance and accounting officers of the Government in paying thousands of officers retired under the same law as the respondents.[2]

The Court of Claims recognized the lack of any substantial problem involved in computing the amounts of pay due in accordance with its opinion. It left this ministerial responsibility fittingly to an administrative agency, the General Accounting Office. When that Office filed its report, the court incorporated the amounts shown to be due the respondents in formal

[2] The respondent Paul is actually the widow and executrix of the estate of a deceased officer, as the petitioner observes (R. 10; Petition, 6 fn).

judgments and entered the judgments without more (R. 107-109). Neither the petitioner nor the respondents raised any question as to the amounts reported by the General Accounting Office and now represented in the judgments of the Court of Claims sought to be reviewed. The petitioner does not now raise any such question.

Under these circumstances, the opinion of November 2, 1954, granting the respondents' motion for summary judgment followed by the denial of the petitioner's motion for rehearing settled finally the legal rights and obligations of the parties. The subsequent report of the General Accounting Office and formal entry of judgment did not disturb or revise the effect of the opinion in any respect. In this light, the rendition of the opinion of November 2, 1954, established the date from which the time for applying for certiorari would have been computed but for the filing of a timely motion for rehearing. *Federal Trade Commission* v. *Minneapolis-Honeywell Regulator Co.*, 344 U.S. 206; see *Fowler* v. *Hamill*, 139 U.S. 549. Then, upon the seasonable filing of the petitioner's motion for rehearing, the time prescribed by 28 U.S.C. § 2101(c) was tolled until denial of the motion on February 8, 1955. *Department of Banking* v. *Pink, supra.* Again, the ninety-day period began to run, and thereafter it ran without interruption until it expired May 9, 1955.

The foregoing effect of the opinion of November 2, 1954, as a judgment of the court is required as fully by the rules of the Court of Claims as by general legal principles expounded by this Court. See U. S. Ct. Cls. Rules 50 and 51(d), 28 U.S.C.A., which are set out in pertinent part in Appendix B, *infra.* Rule 51(d) requires that, upon a motion for summary judgment, if

there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law, the "judgment sought shall be rendered."[3] And Rule 50 defines "judgment" to include "any decree or order subject to a petition for writ of certiorari."

The substance of the order of the Court of Claims entering formal judgment on May 3, 1955, in *Tanner* is also of significance in establishing that the court regarded its opinion of November 2, 1954, as the real judgment. The respondent Tanner claimed in paragraph VII of his petition retired pay "extending to the date judgment may be entered herein." (R. 3-4) His motion for summary judgment was based in part upon the petition (R. 47). The court granted his motion and thus established his right to retired pay to the date of judgment as claimed. The court thereafter ordered that judgment be entered in favor of respondent Tanner for the amount of pay due him to November 2, 1954 (R. 107; App. to Petition, 26). Such an order is consistent only with the concept that the opinion of November 2, 1954, was the judgment of the court.

Further reference to the rules of the Court of Claims discloses that the petitioner itself treated the opinion of November 2, 1954, as the judgment of the court. Rule 53(c) provides for the filing of a motion for rehearing "not later than 30 days after the entry of the judgment." (Appendix B, *infra*) On December 2, 1954, the thirtieth day after the opinion was rendered, the Assistant Attorney General moved for an extension to January 3, 1955, of the time within which the petitioner

[3] "Rendered" and "entered" are frequently synonymous. See *Yznaga del Valle* v. *Harrison*, 93 U.S. 233; *Coppard* v. *Atascosa County State Bank*, 56 F. 2d 1023 (CCA 5th, 1932), cert. den. 286 U.S. 555.

might file a motion for "reconsideration".[4] It is plain that the motion was made upon the Assistant Attorney General's recognition that the opinion of November 2, 1954, was a judgment under Rule 53(c) which would have barred a motion for rehearing after December 2, 1954, in the absence of an enlargement of the time provided thereby. And it would not be an unreasonable inference that the Assistant Attorney General had in mind also that, through the use of this vehicle, the petitioner might further postpone the period within which it must ask review of the judgment by this Court without undergoing the risk of losing all possibility of review by a refusal on the part of the Court of Claims to entertain or consider an untimely motion for rehearing. See *Bowman* v. *Loperena,* 311 U.S. 262, 266.

Finally, the underlying purpose of 28 U.S.C. § 2101(c) is frustrated if the orders of May 3, 1955, rather than the opinion of November 2, 1954, may be viewed as the judgment in these cases. Congress clearly intended by 28 U.S.C. § 2101(c) to assure a definite and short end to litigation which has reached a settlement of its genuine issues in the courts of last resort before the Supreme Court. *Federal Trade Commission* v. *Minneapolis-Honeywell Regulator Co., supra.* Here final determination of the entire dispute was had by the opinion of November 2, 1954, when the petitioner's motion for rehearing was denied February 8, 1955. The later proceedings in the Court of Claims were collateral to the issue and mechanical by nature. They represented the usual treatment of convenience applied

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[4] The record filed by the petitioner does not note the filing of this motion for extending the time within which it might seek rehearing or the allowance of the motion by the court. The motion and the court's order are reproduced as Appendix C hereto.

by the Court of Claims to claims for military pay which have been adjudicated in favor of the claimants. See, for example, *Leonard* v. *United States,* 128 F. Supp. 957, 959 (1955); *Seagrave* v. *United States,* 128 F. Supp. 400, 404 (1955); *Appell* v. *United States,* 128 F. Supp. 153, 154 (1955); *Hadden* v. *United States,* 125 C. Cls. 137, 141 (1953); *Crist* v. *United States,* 124 C. Cls. 825, 827 (1952); *Nickell* v. *United States,* 123 C. Cls. 859, 863 (1952); *Frizzell* v. *United States,* 123 C. Cls. 337, 342 (1952); and *Smith* v. *United States,* 122 C. Cls. 444, 450 (1952).

It is of direct interest to observe that this practice of the Court of Claims results, as should be expected, in a variable, but always substantial, interval between rendition of the opinion disposing of the issues of a case or denial of rehearing where sought and entry of the formal judgment. Examination of the published reports of the foregoing cases where this procedure was invoked fails to indicate that formal judgments have been entered in *Leonard, Seagrave,* and *Appell.* In the others, the time intervening between the opinion or denial of the motion for rehearing and formal judgment was roughly five months in *Hadden,* 126 C. Cls. 944; four months in *Crist,* 124 C. Cls. 825, 827; four and one-half months in *Nickell,* 125 C. Cls. 870; nine months in *Frizzell,* 123 C. Cls. 337, 342; and four months in *Smith,* 122 C. Cls. 444, 451. It should also be noted in this connection that the Court of Claims similarly withheld entry of judgment in *Adams et al.* v. *United States,* 129 C. Cls. 792, the companion case decided in the same opinion as *Tanner* and *Paul* (R. 97-103; App. to Petition, 19-25) and that the General Accounting Office has not yet, over six months after the petitioner's motion for rehearing was denied (R.

105), reported the amounts due the claimants in that case.

Thus, if the petition herein is seasonable, it is apparent that the time limitation upon seeking review of this Court has been indefinitely avoided in an important class of litigation by the practice of the Court of Claims. The period fixed for asking review has been rigidly and progressively shortened by Congress. See Act of June 1, 1872, 17 Stat. 196 (two years); Act of March 3, 1891, 26 Stat. 828 (one year); and Act of February 13, 1925, 43 Stat. 940 (three months). It is inconceivable that Congress has permitted its limitation to go for nought in cases where the Court of Claims has determined the issues and then resorts to an administrative agency for the mechanics involved in transforming its decision into a formal judgment. See *Cole* v. *Violette,* 319 U.S. 581.

It is submitted that the leisurely course of the petitioner in filing for the writ has placed these causes beyond the power of review by this Court. The petition is late and should be denied.

QUESTION PRESENTED

The respondents are officers of the Officers Reserve Corps retired under Section 302(a), Title III, Act of June 29, 1948, 62 Stat. 1081, 1087, 10 U.S.C. 1036a, for long service in the reserves upon attaining the age of 60 years. They are also civilian employees of the Federal Government paid at an annual rate in excess of $3,000. The single question on the merits is whether, by virtue of Section 1(b), Act of July 1, 1947, 61 Stat. 238, 239, such officers may receive their retired pay provided by Title III, Act of June 29, 1948, without regard to the limitations imposed by Section 212(a) of the Economy Act of 1932, 47 Stat. 406, upon the re-

ceipt of retired pay for commissioned service in the Army and civilian compensation from the Government.[5]

STATUTES INVOLVED

The pertinent provisions of Section 212(a) of the Economy Act of 1932, 47 Stat. 406, as of the dates involved in this case; of the Act of July 1, 1947, 61 Stat. 238, 239, 10 U.S.C. (1946 ed.), 371b, also as of the dates involved herein; and of Section 302(a), Title III, Act of June 29, 1948, 62 Stat. 1081, 1087, 10 U.S.C. 1036a, are set forth in the Petition at pp. 2-4.

STATEMENT

The respondents, officers of the Officers Reserve Corps retired under Title III, Act of June 29, 1948, *supra* (Petition, 4), have not been paid any of the retired pay provided for such officers in that Act by reason of their continued employment by the United States in civilian capacities at annual salary rates in excess of $3,000. Following their retirement as reserve officers, they were advised by the Army that their retired pay under the Act of June 29, 1948, was subject to the restrictions of the Economy Act of 1932, *supra* (Petition, 2), and, as they were civilian employees of the Federal Government with salaries at annual rates in excess of $3,000, they could not receive retired pay. The respondents thereafter brought suit in the Court of Claims to recover their retired pay.

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[5] The petitioner has misstated the question presented (Petition, 2). By ignoring the requirement of Rule 23(1)(c) that the question be "expressed in the terms and circumstances of the case", the petitioner has created the appearance here of a question affecting every reserve officer of the Army retired under any law. Actually, the question relates only to reserve officers of the Army retired under Title III, Act of June 29, 1948. See Argument, p. 14, *infra*.

The Court of Claims held, in an opinion rendered November 2, 1954, upon all parties' motions for summary judgment, that section 1(b) of the Act of July 1, 1947, providing that "no existing law shall be construed to prevent any member of the Officers' Reserve Corps * * * from accepting employment in any civil branch of the public service nor from receiving the pay incident to such employment in addition to any pay and allowances to which he may be entitled under the laws relating to the Officers' Reserve Corps" permits the respondents as members of the Officers Reserve Corps to receive their retired pay under Title III, Act of June 29, 1948. The court, accordingly, granted the respondent's motion for summary judgment.

ARGUMENT

The decision below is of insufficient moment to warrant exercise of this Court's jurisdiction. It applies to an unascertainable number of reserve officers of the Army representing a relatively small fraction of all such officers. The ones who are affected are, broadly stated, those civilian employees of the United States who, having reached the age of 60 years and completed at least 20 years of satisfactory service in reserve components of the armed services, are retired under Title III, Act of June 29, 1948, *supra,* (Petition, 4), and thereafter continue to earn a living from their employment with the Federal Government. How narrow the decision really is will be shown hereinafter.

If the decision should seem to be of importance in any aspect, however, it is right. It reflects the intransigent policy of Congress following World War II to build and maintain a large, trained, and active reserve force through the means of offering incentives for reserve service. The decision does this in consonance

with the letter, spirit, and purpose of the Act of July 1, 1947.

I

The Decision Presents No Issue of General Importance.

The petitioner represents (Petition, 7) that the decision of the Court of Claims tortures the Act of July 1, 1947, beyond its design. The result, the petitioner says, is that the court has held that reserve officers who are employees of the Government are entitled to double pay while regular officers are entitled to nothing.[6] The petitioner concludes that this utterly confuses the relationship between the retirement provisions for regular and reserve officers.

The probable implication of all that the petitioner says in this respect is that these conditions make an important Federal question. Remarkably, the petitioner does not undertake to describe either the "relationship between the retirement provisions for regular and reserve officers" or the "utter confusion" to which the Court of Claims has consigned it. Obviously a mere reference to "relationship" and "confusion" does not create an important Federal question.

The fact, of course, is that *some* relationship does exist between the incidents of the respective retirement of reserves and regulars. But the actual relationship, disregarding the effect of the decision herein sought to be reviewed, is hardly of the sort which the petitioner hoped to suggest to the Court. The incidents of reserve retirement vary from those of regular retirement in literally hundreds of respects. The respondents cannot here presume to impose upon the Court by pointing out all or even many of the differences. Specification

[6] Under the decision below, reserve officers of the class here concerned are entitled to their civilian salary and to retired pay amounting to a fraction of the retired pay of regulars, *infra*, p. 15.

of simply the following single contrast should suffice to expose and allay the bogy advanced by the petitioner:

a. *Regulars.* A different statute from the Economy Act has for 61 years barred regular officers of the armed services, retired for age or length of service as respondents were, from virtually any Federal civilian employment when either their retired pay or the civilian compensation exceeds $2,500 a year. Section 2 of the Act of July 31, 1894, 28 Stat. 205, 5 U.S.C. 62, which is set out as Appendix D, *infra*, prohibits the civilian employment by the Federal Government of any regular officer, except officers of the armed services retired for physical disability, when either the retired pay of the officer or the compensation of the civilian position exceeds $2,500 a year.[7] The statute has been uniformly so construed. See 21 Comp. Gen. 1129, (1942); 14 Comp. Gen. 289, 292 (1934); 13 Comp. Gen. 161, 162 (1933); 13 Comp. Gen. 60 (1933); 10 Comp. Gen. 85 (1930); 1 Comp. Gen. 700 (1922); and 11 Comp. Dec. 422 (1905). As the minimum salary of a GS grade in Civil Service is now $2,690 a year (Pub. L. 94, 84th Cong., 1st Sess., June 28, 1955), it follows that a retired regular officer not of a class particularly exempted from the operation of the Act of July 31, 1894, may not even hold employment in a civilian capacity with the United States, much less receive a salary therefrom.

b. *Reserves.* On the other hand, reserve officers not on active duty have long been specifically excepted from the Act of July 31, 1894. The Act of July 1, 1930, 46 Stat. 841, provided that

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[7] Retired regular officers elected to public office or appointed to office by the President with the advice and consent of the Senate are also excepted from the prohibition by the terms of the statute.

> "Reserve officers while not on active duty shall not, by reason solely of their appointments, oaths, commissions, or status as reserve officers, or any duties or functions performed or pay or allowances received as reserve officers, be held or deemed to be officers or employees of the United States, or persons holding any office of trust or profit or discharging any official functions under or in connection with any department of the Government of the United States."

The Comptroller General held, shortly after the approval of the Act of June 29, 1948, that reserve officers retired under Title III of that Act are outside the effect of the Act of July 31, 1894, by virtue of the Act of July 1, 1930. 28 Comp. Gen. 367, 368 (1948). That holding of the Comptroller General has never been modified.

In these circumstances, it would seem that the Comptroller General's decision accurately depicts the present administrative practice: regular officers in a retired status for age and longevity generally cannot be employed in a civilian capacity by the Government while reserve officers similarly situated not only can accept civilian employment but also can receive full compensation therefor, provided they draw no retired pay. It is more than hard to understand how any disturbance of so disparate a relationship could be a matter of great import. If the decision of the court below adds to the disparity, the added effect is small in relation to the unbalance otherwise existing.

But, the petitioner continues (Petition, 7-8), the decision of the Court of Claims extends beyond the Army to the Air Force, and its rationale applies to all the armed services, and indeed, may apply to every retired reserve officer who is a Government employee.

And, "partial estimates" from unidentified sources indicate 3,000 potential claimants with liability perhaps totalling several millions of dollars.

Again, the petitioner omits to supply the reason or other authority for representations made in its effort to persuade the Court that the decision below involves a question of enough importance to justify review. Accordingly, the respondents are handicapped in testing the petitioner's statements as the Court will be in weighing them.

Except for the happening of an event after the Petition herein was filed on July 29, 1955, the respondents would have been able merely to point to the circumstance that the Court of Claims was dealing in these cases with one set of laws relating to retirement, whereas reserve officers of the Navy, Marine Corps, and Coast Guard, as well as some Army and Air Force reserve officers, are retired under different statutory schemes. For instance, it cannot be successfully maintained that officers of the Naval Reserve may avail themselves of the Act of July 1, 1947, which affects only members of the Officers Reserve Corps, an Army component. Naval reservists must look to their own laws such as Section 4 of the Naval Reserve Act of 1938, 52 Stat. 1176, which is phrased similarly to but not the same as the Act of July 1, 1947.

Extended argument in that direction is not now necessary. On August 4, 1955, Public Law 239, 84th Cong., 1st Sess., was enacted by the President's approval of H.R. 5893 on that day. The new statute directly amended Section 212(a) of the Economy Act by increasing its retired pay and salary limitations from $3,000 to $10,000.

It is manifest that Public Law 239, standing alone, has the effect of fully satisfying for future periods the entitlement to retired pay of many reserve officers-civilian employees retired under Title III of the Act of June 29, 1948, and substantially satisfying the entitlement of all but a few. This is evident in the light of the relatively low rate at which reserve officers retired under Title III are paid.[8] To illustrate: a regular officer of the respondent Tanner's grade (lieutenant colonel) and with exactly the same service in the Army (over 30 years commencing in 1917) who was retired for age or longevity on the same date as Tanner (June 30, 1952) would have received retired pay at the rate of $455.72 a month as compared with Tanner's retired pay of $159.50. See Official Army Register, 1 January, 1953, Vol. I, p. 1317. This wide difference in pay results from the more generous provisions made by Congress for retired regulars. *Reynolds* v. *United States,* 125 C. Cls. 108 (1953), cert. den. 346 U.S. 826.

Regardless of any importance that may have attached to the question here at the time the Petition was filed, the subsequent enactment of Public Law 239 makes inapposite much of what the Petition asserts in this respect. Certainly, a substantial part of any "utter confusion" of the relationship between regular and reserve retirement created by the decision below cannot be undone by this Court, for retired reserves like respondents can now receive up to $10,000 a year in combined civilian salary and retired pay and

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[8] The average pay of an officer retired under Title III, Act of June 29, 1948, was estimated in 1948 to be $674 a year. Senate Report 1543, 80th Cong., 2d Sess. The minimum pension allowed to veterans for 90 days of service in the Spanish-American War is more. See Act of August 4, 1951, 65 Stat. 174.

retired regulars in the same status can still receive nothing but retired pay because the Act of July 31, 1894, remains unchanged. See the letter report of the Comptroller General to the Senate Finance Committee considering H.R. 5893 (Appendix E, *infra*) wherein he especially brought the Act of July 31, 1894, to the attention of the Committee and expressed his desire for a revision of it. Despite the Comptroller General's concern, H.R. 5893 became Public Law 239 without touching the Act of July 31, 1894. And, although there may still be future liability for millions of dollars in retired pay to thousands of reserve officers who are civilians employed by the Government, as the petitioner asserts, the principal responsibility for that condition will rest upon Congress and the President for Public Law 239 and not upon the courts for the decision below.

II

The Decision Below Is Clearly Correct.

Upon a thorough study of the language of the statute, the history of its enactment, and the administration of its provisions, the Court of Claims correctly accorded natural meaning to the terms in which the Act of July 1, 1947, was expressed. There can be no real dispute that the "pay and allowances" which the Act permits to be paid to reservists having civilian employment with the United States would, in the ordinary significance of the phrase, include retired pay.

The petitioner insists, however, that the sole purpose of the Act was to grant to enlisted men of the Army reserve who are Government employees the same rights relating to military leave of absence from their civilian occupations as were already enjoyed by reserve officers of the Army and by all Naval reservists. But Section

1(a) of the Act, read alone, grants to all reservists of the Army "the same right to leave of absence for 15 days of military duty and to receive *for that military duty* pay and allowances in addition to civilian salary" as the petitioner says is granted by Sections 1(a) and 1(b), read together. Section 1(b) adds nothing to Section 1(a) in this particular as becomes apparent when it is considered that officers of the Army reserve, commencing in 1917, have enjoyed the right to 15 days of military leave and to receive both military pay and civilian salary during that period of leave under provisions of the Act of May 12, 1917, 40 Stat. 72, quite similar to Section 1(a). 1 Comp. Gen. 544 (1922).

The petitioner's contention as to the singleness of the purpose and effect of the Act of July 1, 1947, thus would leave Section 1(b) without meaning. It should be rejected for that reason alone. But there are other compelling reasons why the court below was right in attributing to Section 1(b) the effect of the usual sense of its language.

As introduced, H.R. 1845, which became the Act of July 1, 1947, was designed simply to extend to enlisted reservists the rights to military leave and job restoration theretofore held by reserve officers. When considered by Congress, however, it had been supplanted by a wholly new bill, also called H.R. 1845. The new H.R. 1845 had been derived from still another bill, H.R. 3144, which had been framed by the War and Navy Departments upon instructions from the House Armed Services Committee to draft "a new bill to take care of all the outstanding problems." This is disclosed in the record of the hearings held on H.R. 1845 by a subcommittee of the House Armed Services Committee (Hearings before Subcommittee No. 11,

Legal, Committee on Armed Services, on H.R. 1845, 80th Cong., 1st Sess. [No. 139].

At the hearings, Navy Captain Nunn, the principal witness, explained the purpose of the expanded H.R. 1845 (id. at p. 2243):

> "Subsection 1(b) gives members of both enlisted and officers reserve corps the same right to re-employment in any civil branch of the public service, *to receive pay and allowances incident to such employment in addition to pay and allowances they may be entitled to,* and to practice civil professions or occupations before or in connection with any department of the Federal Government. *It gives them those rights that naval reservists now have under the last provision of Section 4 of the Navy Reserve Act of 1938* * * * ". [Emphasis supplied][9]

Captain Nunn's testimony was paraphrased and adopted by the Committee for House Report 483, 80th Cong., 1st Sess., in stating the effect of what became Section 1(b) of the Act.

When the Senate Armed Services Committee reported H.R. 1845 without amendment, it was again shown clearly that the purpose of the bill considerably exceeded its original confines (Senate Report 327, 80th Cong., 1st Sess.):

> "The purpose of this bill is to unify the existing laws pertaining to the granting of military leave to permanent and indefinite employees of the United States who are members of the Reserve

---

[9] Retired members of the Naval Reserve had a right under the last proviso of Section 4 of the Naval Reserve Act of 1938, 52 Stat. 1176, to receive civilian compensation and retainer or retired pay without regard to Section 212(a) of the Economy Act. 25 Comp. Gen. 521 (1946).

Components of the various services including the National Guard.

"In addition, the bill clarifies the rights of civil employees to compensation for their service with the Reserves and prevents the loss of any rights which they normally would have in relation to their occupation.

* * * * *

"The bill clarifies the point that members of the Reserve Corps are entitled to pay from their Reserve organizations in addition to their normal civil pay * * * " [Emphasis supplied]

H.R. 1845 thereupon passed the Senate without amendment and became law.

The legislative history of H.R. 1845 upon which the respondent relies (Petition, 9-12) is thoroughly consistent with the result reached by the Court of Claims when viewed in the light of the foregoing account of the course of the bill through Congress. All that can be said of Captain Nunn's statement (Petition, 9-10) is that the portions quoted by the petitioner will more accurately depict all of the bill's objects when read with the portion of the same statement quoted by the respondents, *supra,* p. 18. As for the cost estimate contained in the House Committee report (Petition, 12), it is obvious that, when it was made, the only additional cost involved in the bill related to enlisted men. At that time, there was no military retired status with entitlement to pay which could have been occupied by a member of the Officers Reserve Corps.

In an attempt to buttress its argument, the petitioner resorts to a colloquy on the House floor when the Act of June 29, 1948, was debated (Petition, 13-14). The member in charge of the bill, evidently taken unaware

by a question, expressed his view in general terms that the Economy Act would apply to prohibit the receipt of retired pay under the bill if a reserve officer should be civilly employed at a salary of over $3,000. If this offhand opinion establishes that Congress has not considered that the Act of July 1, 1947, exempts reserve officers retired under Title III, Act of June 29, 1948, as the petitioner asserts that it does, then there is ample evidence of more cogent nature that Congress later changed its mind.

First, in 1950, a bill, S. 2351, to "simplify and consolidate the laws relating to the receipt of compensation from dual employments under the United States" passed the Senate and the House. S. 2351 was plainly designed as a mere codification of existing laws relating to dual compensation except that it raised the limit on such annual compensation from the then existing $3,000 to $5,000. 95 Cong. Rec. 13336. *One provision of S. 2351 as it passed both Houses specifically exempted from all dual-salary limitations retired pay provided by Title III of the Act of June 29, 1948.* The House version of S. 2351 differed from the Senate-approved bill in other respects, and the measure died in conference with the adjournment of the 81st Congress.

Then, when H.R. 5893, which became Public Law 239, 84th Congress, amending Section 212(a) of the Economy Act by raising its ceiling to $10,000, *supra*, p. 14, was considered by the House on July 5, 1955, the following question by Mr. Haley, a member of the Veterans Affairs Committee reporting the bill, and answer by Mr. Aspinall, in charge of the bill and also a member of that Committee, immediately preceded its passage by consent (101 Cong. Rec. 8481):

"MR. HALEY. Mr. Speaker, reserving the right to object, I would like to ask a question of the gentlemen in charge of the bill as to some of the language appearing in the report. I notice that there are only two exceptions made in this particular case.

"MR. ASPINALL. There are two exceptions to the general statement, as the gentleman suggested. The prohibition does not apply to any regular or emergency commissioned officer retired for disability on a basis (1) of an injury incurred in combat with an enemy of the United States, or (2) caused by an instrumentality of war. *The amendments to this act will not have any effect on the right of Reserve or National Guard officers to draw civilian compensation without regard to section 212 of Public Law 212, 72d Congress* [*Economy Act of 1932*]." [Emphasis supplied]

Last, on July 30, 1955, H.R. 7049 codifying all the laws relating to the armed forces was called on the consent calendar of the House. At that time, Mr. Haley questioned Mr. Willis, who had served as chairman of the subcommittee of the Committee on the Judiciary hearing the bill and was in charge of the bill (101 Cong. Rec. 10581):

"MR. HALEY. Mr. Speaker, reserving the right to object, I should like to inquire of the gentleman in charge of the bill whether there is anything in the bill which will have the effect of changing the present law which gives Reserve and National Guard officers retired under title III of the act of June 29, 1948, the right to draw their retired pay without regard to section 212 of the Economy Act of 1932.

"MR. WILLIS. Mr. Speaker, if the gentleman will yield, I assure the gentleman *there is no change in it.*

"MR. HALEY. I withdraw my reservation of objection, Mr. Speaker." [Emphasis supplied]

H.R. 7049 subsequently passed the House by consent.

The petitioner's final criticism of the decision of the court below is that the Act of July 1, 1947, could not have contemplated release of reserve officers retired under the Act of June 29, 1948, from the Economy Act because the right of such officers to receive retired pay did not exist when the Act of 1947 became law. This sort of argument, it is submitted, should have lost any force it may ever have had when in 1819 the Court decided the *Dartmouth College* case, 4 Wheat. 518, 566.

In closing, the respondents suggest that, whatever may be the effect of the decision of the Court of Claims, it is plainly in furtherance of basic policy of the United States to build and maintain a strong military reserve. If it be true, however, that Congress did not intend that that policy and this situation consist, the petitioner has had a whole session of Congress in which it might have sought to repair the breach, allegedly serious, made in the Economy Act by the Court of Claims. It has chosen not to approach Congress but only to seek the assistance of this Court in restoring the damage done an "outmoded" law which, upon the authority of the Comptroller General (Appendix E, *infra*), "operates against the interests of the United States". The route travelled by the petitioner would seem to be the less efficacious unless it should be, as the respondents believe, that the decision below does in truth conform to the will of Congress.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for writs of certiorari should be denied.

BURR TRACY ANSELL,
Counsel for Respondents

Of Counsel:

ANSELL AND ANSELL

August, 1955

APPENDIX A

EXCERPTS FROM UNITED STATES COURT OF CLAIMS GENERAL DOCKET—GENERAL JURISDICTION, Volume 86

• • • • •

No. 543-53 Paul Tanner v. The United States.

• • • • •

Nov. 2, 1954 Plaintiffs are entitled to recover in this and cases No. 38-54 and 39-54. Entry of judgments is suspended pending the filing of a report by the General Accounting Office showing the amount due plaintiffs in accordance with this opinion. Opinion by Judge Madden.

• • • • •

No. 39-54 Elizabeth Ruth Paul, Executrix of the Estate of Earle Evarts Paul, Deceased v. The United States.

• • • • •

Nov. 2, 1954 Plaintiff is entitled to recover. Entry of judgment is suspended, etc. See opinion by Judge Madden in Paul Tanner, No. 543-53.

APPENDIX B

RULES OF THE COURT OF CLAIMS OF THE UNITED STATES
Revised October 14, 1954

• • • • •

VI. JUDGMENTS, REHEARINGS, NEW TRIALS, AND APPLICATIONS FOR CERTIORARI.

Rule 50. Judgment

Definition. "Judgment" as used in these rules includes any decree or order subject to a petition for writ of certiorari.

Rule 51. Summary judgment

* * * * *

(d) Motion and Proceedings Thereon. After a motion for summary judgment has been filed * * * such motion shall be assigned to the calendar, as provided in Rule 47 (b). The judgment sought shall be rendered if the pleadings, depositions and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(e) Case Not Fully Adjudicated on Motion. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the Court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall, if practicable, ascertain what material facts exist without substantial controversy and what material facts are actually in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

* * * * *

Rule 52. Entry of judgment

When the Court directs the entry of judgment, the Clerk shall enter judgment forthwith upon receipt by him of the direction. The notation of a judgment on the docket, as provided in Rule 73, constitutes the entry of judgment.

Rule 53. Rehearing; amendment of judgments; new trials

(a) Grounds. (1) A rehearing may be granted, a judgment may be altered or amended, or a new trial may be granted when any party questions the correctness or the sufficiency of the Court's conclusions on its findings of fact, or desires to amend the same, or on any ground established by rules of common law or equity applicable as between private parties.

(2) The Court, at any time while any suit is pending before it, or after proceedings for review have been instituted, or within two years after the final disposition of the suit, may grant the United States a new trial and stay the payment of any judgment upon satisfactory evidence, cumulative or otherwise, that any fraud, wrong, or injustice has been done the United States.

(b) Action by Court. On a motion for a rehearing, on a motion to alter or amend a judgment, or on a motion for a new trial, the Court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.

(c) Time for Motion. Except as provided in subsection (a) (2) of this rule, a motion for a rehearing or a motion to alter or amend a judgment or a motion to grant a new trial shall be filed not later than 30 days after the entry of the judgment.

• • • • •

VIII. COURT AND CLERK'S OFFICE.

• • • • •

Rule 73. Docket

It shall be the duty of the Clerk to keep a general docket in which shall be entered the title and nature of all suits

brought in the Court, the names of the attorneys filing such suits, the designated attorneys of record, and all other proceedings had during the progress of the case.

APPENDIX C-1

IN THE UNITED STATES COURT OF CLAIMS

No. 543-53

PAUL TANNER, *Plaintiff*,

v.

THE UNITED STATES, *Defendant*;

No. 38-54

CHARLES C. ADAMS, ET AL., *Plaintiff*,

v.

THE UNITED STATES, *Defendant*;

No. 39-54

ELIZABETH RUTH PAUL, EXECUTRIX OF THE ESTATE OF EARLE EVARTS PAUL, *Plaintiff*,

v.

THE UNITED STATES, *Defendant*.

Defendant's Motion to Extend Time for a Motion for Reconsideration

Defendant requests that its time to file a motion for reconsideration in these cases be extended for thirty days, to January 3, 1955. These cases involve, and are of interest to, a number of different departments and agencies, including the Army, Navy, Air Force and General Accounting Office. We desire to receive and study the comments of all of these agencies before filing any motion

for reconsideration. To date we have heard from only two of the interested agencies.

Respectfully submitted,

/s/ WARREN E. BURGER
Warren E. Burger
Assistant Attorney General
Civil Division

KENDALL M. BARNES
Attorney, Civil Division
Department of Justice

APPENDIX C-2

UNITED STATES COURT OF CLAIMS

No. 543-53, 38-54, 39-54

PAUL TANNER, ET AL.

VS.

THE UNITED STATES

Clerk's Office
Washington, D. C., Dec. 3, 1954

To Attorney of Record and Assistant Attorney General, and Commissioner .....

Sirs:

Please take notice that in the above-entitled cause there has been entered this day on the defendant's motion for extension of time to file motion for reconsideration the following order: Allowed.

Respectfully,

/s/ WILLARD L. HART
Clerk, Court of Claims.

U.S. Government Printing Office 16-65195-1

APPENDIX D

Act of July 31, 1894, 28 Stat. 205, as amended, 5 U.S.C. 62

"No person who holds an office the salary or annual compensation attached to which amounts to the sum of two thousand five hundred dollars shall be appointed to or hold any other office to which compensation is attached unless specially authorized thereto by law; but this shall not apply to retired officers of the Army, Navy, Marine Corps, or Coast Guard whenever they may be elected to public office or whenever the President shall appoint them to office by and with the advice and consent of the Senate. Retired enlisted men of the Army, Navy, Marine Corps, or Coast Guard retired for any cause, and retired officers of the Army, Navy, Marine Corps, or Coast Guard who have been retired for injuries received in battle or for injuries or incapacity incurred in line of duty shall not, within the meaning of this section, be construed to hold or to have held an office during such retirement."

APPENDIX E

Extract from Letter Report of General Accounting Office to Committee on Finance, United States Senate, upon H.R. 5893, 84th Cong., 1st Sess., Published in Senate Report No. 1023, 84th Cong., 1st Sess.:

Comptroller General of the United States,
Washington, July 15, 1955.

Hon. Harry F. Byrd,
Chairman, Committee on Finance,
United States Senate.

Dear Mr. Chairman: Reference is made to your letter of July 11, 1955, requesting our report upon H.R. 5893.

* * * * *

The matter of raising the amount of the limitation contained in section 212 from $3,000 to $10,000, as provided

for in section 2 of the bill, concerns one of policy which must be decided by the Congress. We feel, however, that because of the substantial increases in the compensation of Government personnel since the year 1932—the year of enactment of section 212—the $3,000 limitation contained in section 212 is far more restrictive today than it was at the time of its enactment. In 1932, CAF salaries began at $1,260 per annum. Today, GS grades begin at $2,690 per annum. In 1932, the entrance rate of salary for grade CAF-8 was $2,900. Today, the entrance rate of salary for grade GS-8 is $4,970 per annum while the entrance rate of grade GS-3 is $3,175 per annum. Thus, it may be seen that at the present time the $3,000 aggregate limitation would operate virtually in every case except those specifically excepted by statute from its application. Doubtless the existing limitation operates against the interests of the United States in those cases where the Government is deprived of the services of qualified personnel who but for said limitation would accept civilian positions under the United States.

The same thing is true, however, regarding other outmoded laws relating to dual employment and double compensation, among the most important of which are the act of July 31, 1894, as amended (5 U.S.C. 62), prohibiting a person who holds an office, the annual compensation of which amounts to $2,500, from being appointed to or holding any other office to which compensation is attached unless specifically authorized by law, and the act of May 10, 1916, as amended (5 U.S.C. 58), prohibiting the use of appropriated moneys for payment to any person receiving more than 1 salary when the combined amount of said salaries exceeds the sum of $2,000 per annum. While we would prefer the enactment of a single revision consolidating and simplifying all of the various laws presently in effect relating to dual employment and double compensation, yet in view of the short time remaining in

the present session of Congress we offer no objection to enactment of section 2 of H.R. 5893.

Sincerely yours,

JOSEPH CAMPBELL,
Comptroller General of the United States.

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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 280

UNITED STATES OF AMERICA, PETITIONER

v.

PAUL TANNER

UNITED STATES OF AMERICA, PETITIONER

v.

ELIZABETH RUTH PAUL, EXECUTRIX OF THE ESTATE OF EARLE EVARTS PAUL, DECEASED

ON PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN RESPONSE TO BRIEF IN OPPOSITION

In its petition for certiorari in this case, the Government seeks review of a Court of Claims decision which, by an interpretation of the Act of July 1, 1947, 10 U. S. C. (1946 ed.) 371, 371b (Pet. 3–4), grants a wholly unwarranted exception to Army reserve officers from the traditional statutory restrictions on the simultaneous receipt

of retired pay and government salary.[1] Those charged with the administration and application of the controlling statutes have never so read them. And, as shown in the petition for certiorari, the plain language of the statutes, their history and purpose support the conclusion that uniform application was intended. In other words, Army reserve officers are in the same position, insofar as the receipt of dual compensation from the Government is concerned, as other service officer groups.

Recognizing the force of this position, the brief in opposition endeavors to create a belief that Congress must be deemed to share the view of the court below and to have intended the irrational inequality of treatment which flows from that decision. This attempt proceeds in two ways. On the one hand, respondents refer to statements, said to compel this conclusion, by members of Congress in connection with current pieces of legislative business, unrelated to the present problem. In addition, respondents appear to assert that inequity of treatment is inherent in the pattern which Congress has established for various service classes and that, accordingly, the judgment of

[1] As set forth in the petition (pp. 7–14), the statute relied on by the Court of Claims for the creation of this broad privilege was intended by Congress to protect government-employed reservists for the 15-day active training period, a much narrower and entirely different purpose than that for which the court below utilized it.

the court below can be taken as fitting into such pattern. We shall show below that there is little substance to either of these two arguments. First, however, we shall comment on respondents' argument that this Court lacks jurisdiction to entertain the government's petition.

1. Respondents contend that the petition for certiorari in this case "* * * was not filed within the time allowed by law * * *" (Br. in Opp., 1–2). Respondents' essential position is that the question whether the November 2 opinion constituted a final reviewable judgment, for the purpose of starting the running of the ninety-day period provided by 28 U. S. C. 2101 (c),[2] turns on the intention of the court below. Starting with this premise, respondents contend that, since the court below, in its opinion on November 2, 1954, decided that respondents could receive retired pay, the opinion constituted a final judgment. Referring to the docket entries of November 2, 1954, and to certain rules of the Court of Claims (Br. in Opp., Apps. A and B, 24–27), respondents conclude that the court below "* * * regarded its opinion of November 2, 1954, as the real judgment. * * *" (Br. in Opp., 5).

[2] 28 U. S. C. 2101 (c) provides:

(c) Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. * * *

The ascertainment of finality of action for the purpose of determining appealability, frequently a technical and troublesome question, has arisen on frequent occasions in connection with Court of Claims judgments. Initially, of course, the finality problem with regard to Court of Claims action arose in connection with a fundamental constitutional problem. See, *e. g.*, *Gordon* v. *United States*, 2 Wall. 561, and opinion of Mr. Chief Justice Taney set forth at 117 U. S. 697. In the light of the *Gordon* case, Congress specifically inserted the word "final" in describing those Court of Claims judgments reviewable in this Court by the Act of March 3, 1863, 12 Stat. 765, 766. The word "final" was omitted in the comparable section contained in the Judiciary Act of March 3, 1911, 36 Stat. 1157. However, the omission of the word as unnecessary worked no change as to the sort of Court of Claims judgment which could be presented for review. See *United States* v. *Ellicott*, 223 U. S. 524, 539; *Luckenbach S. S. Co.* v. *United States*, 272 U. S. 533, 535; *Morse* v. *United States*, 270 U. S. 151, 154; *Southern Pacific Co.* v. *United States*, 270 U. S. 103, 105; *Standard Steel Car Co.* v. *United States*, 61 Ct. Cls. 391. The pertinent provisions of the 1911 Act were superseded by the Judiciary Act of February 13, 1925, 43 Stat. 936, 939. Here again, Chief Justice Taft, in presenting this Court's legislative proposals, made it plain that

only *final* judgments of the Court of Claims would be reviewed. *Hearings before the Subcommittee of the Senate Committee on the Judiciary,* 68th Cong., 1st Sess., February 2, 1924, on S. 2060 and S. 2061, p. 22; see also H. Rep. 1075, 68th Cong., 2d Sess., p. 4.[3]

This traditional restriction on the nature of Court of Claims judgments reviewable in this Court has, over the years, been taken as meaning, in the ordinary type of case, that judgments were not ripe for review until finalized in every respect. However, it was early recognized that, in certain types of cases, it was clearly to the advantage of all litigants, and to the courts in the administration of their business, to defer troublesome and expensive hearings on the question of monetary recovery until fundamental issues on the merits were completely put at rest.[4] Thus, severances and the entry of separate orders on the merits

[3] The 1948 Revision of the Judicial Code seems to us to have worked no substantial change. 28 U. S. C. 1255. See, however, the Reviser's Note which states that the section, as codified, permits unrestricted review of Court of Claims judgments. Cf. Stern and Gressman, *Supreme Court Practice*, (2d ed. 1954) 44–45.

[4] Contrary to respondents' suggestion (Br. in Opp., 3), the ascertainment of the exact amount of recovery is rarely a simple act of computation. Even in a pay case such as this, innumerable and time-consuming variations arise. See, *e. g.*, Br. in Opp., 7–8. And in many other types of cases issues of great complexity, requiring hearings and trials over long periods of time, may be necessary before final ascertainment of damages.

were utilized in patent cases, Indian claims cases, and cases arising under special jurisdictional acts. See, *e. g., Marconi Wireless Co.* v. *United States,* 320 U. S. 1, 47; *United States* v. *Alcea Band of Tillamooks,* 329 U. S. 40 and 341 U. S. 48; *United States* v. *Esnault-Pelterie,* 299 U. S. 201. In such cases, both the orders on the merits and the "final" judgments were held to be reviewable. *Marconi Wireless Co., supra.* As other types of cases in the Court of Claims began to present, in increasing numbers, the same sort of problems which had justified the severance practice in the patent and Indian cases, the same method of handling was utilized. See *United States* v. *Caltex,* 344 U. S. 149.

As we see it, then, a flexible and efficient procedure, developed in areas where it has constituted traditional practice, has been extended to any case in which it is appropriate and in the interest of litigants to present Court of Claims action to this Court for review at either of two points, the entry of a first order on the underlying issues or the entry of a "final" order terminating the entire proceedings. Thus, even if the November 2 opinion in this case constituted a reviewable interlocutory order, we do not believe that the whole case could not be brought up by a petition addressed to the order entered on May 3, 1955 (Pet. 27).

However, it is not necessary to reach that question in the instant case since it is clear that the Court of Claims had no intention on November 2, 1954, of issuing an *order* on the merits in this case. We think it clear, as respondents suggest, that what constitutes a final and reviewable judgment or order is within the control of the court whose action is in question. As noted by both majority and dissenting opinions of this Court in *Federal Trade Commission* v. *Minneapolis-Honeywell Co.*, 344 U. S. 206, 212, 216, it has been held that it is the "* * * obvious intent of the [court below], apparent on the face of the proceedings. * * *" which is crucial. *Rubber Co.* v. *Goodyear*, 6 Wall. 153, 155–156. In this case, the "obvious intent" is crystal clear. As revised in 1953, Rule 38 (c) of the Court of Claims Rules provides:

> (c) *Separate Determination of Liability:* Upon stipulation of the parties, subject to approval by the Commissioner, or upon order of the Court or the Commissioner, trials may be limited to the issues of law and fact relating to the right of a party to recover, reserving the determination of the amount of recovery and the amount of offsets, if any, for further proceedings.
>
> In any case, whether or not such an order has been entered, where the Court determines that a party is entitled to recover and the amount of the recovery is reserved

> for further proceedings, the judgment on the question of the right to recover shall be final, subject to proceedings had under Rules 53 and 54.[5]

In other words, in 1953 the Court of Claims specifically recognized the need for a clear procedure with regard to reviewable interlocutory orders when such were intended. We are advised that the action was taken with this Court's decision in the *Minneapolis-Honeywell* case in mind. In any event, the court adopted a procedure whereby finality could easily be recognized where intended.[6]

The language of the opinion of November 2, and the docket entries made on the same date,

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[5] Prior to the 1953 revision, Rule 38 (c) contained no provision with regard to the entry of a final judgment and an interlocutory phase of severed proceedings. Rule 38 (c), as it read prior to 1953 provided:

> (c) *Preliminary Determination of Liability:* Upon stipulation of the parties, subject to approval by the Commissioner, or upon order of the Court, trials in the first instance shall be limited (1) in patent cases to the issues of validity and infringement and (2) in other cases to the issues of law and fact relating to the right of plaintiff to recover. If, upon determination of such issues, the Court holds in favor of plaintiff, it shall enter its judgment in the form of an interlocutory order, reserving the determination of the amount of recovery and the amount of off-sets, if any, for further proceedings.

[6] Cf. *Sears, Roebuck and Co.* v. *Mackey*, No. 34, this Term, in which this Court will have before it the interrelation of court rules and statutes controlling the right to appeal from district courts to courts of appeals.

must be considered in the light of this rule. The opinion of November 2, 1954, specifically states "* * * entry of judgment will be suspended * * *" (Pet. 25). Similarly, the docket entry of November 2, 1954 recites specifically that the entry of judgment is suspended (Br. in Opp., App. A, 24). Finally, the judgment of May 3, 1955, again recites that an opinion was handed down on November 2, 1954, but that the entry of judgment was suspended (Pet. 27). We submit that, in revising Rule 38 (c), the Court of Claims sought to avoid unintended and automatic consequences at interlocutory phases of cases, that it reserved the right to enter or not to enter a reviewable judgment on issues on the way to a final judgment, and that, here, the precise wording of the opinion, the docket entry and the judgment demonstrate that the Court of Claims did not intend to issue a reviewable judgment on November 2, 1954.[7] We further submit that this intention is controlling. See *Rubber Co.* v. *Goodyear,* supra; *Healy* v. *Pennsylvania R. Co.,* 181 F. 2d

[7] To support its position, respondents argue that the Government's motion to *reconsider* the result reached in the opinion of November 2, 1954, was in effect a recognition that a final order had been entered. However, it seems clear that a litigant is entitled to ask for the reconsideration of any ruling during the progress of a litigation without running the risk of losing the right of review by doing so. Moreover, the Government was careful to frame its motion to the court below in terms other than those prescribed by that Court's rules for motions addressed to final judgments.

934, 937 (C. A. 3); *In re Forstner Chain Corp.*, 177 F. 2d 572, 575 (C. A. 1); *Crutcher* v. *Joyce*, 134 F. 2d 809 (C. A. 10). Accordingly, the time within which to petition for certiorari did not begin to run in this case until May 3, 1955.

2. As indicated above, the brief in opposition argues that Congress must be deemed to share the view of the court below on the merits of this case, namely, that the 1947 statute was designed to create a preference, with regard to the unrestricted right to receive retired pay and governmental salary, for Army reserve officers alone. This argument is based in part on excerpts from two areas of current legislative activities (Br. in Opp., 20–22). Read in context, neither of these excerpts lead to the conclusion for which respondents advance them.

a. Respondents attempt to derive from the legislative history of P. L. 239, 84th Cong., 1st Sess., the inference that Congress specifically approved the privilege created for Army reserve officers by the opinion below. No such inference can be drawn from a fair consideration of this legislation, the Government's position on it, or its legislative history. P. L. 239, reaffirming the policy of a restriction on dual compensation, raised the statutory ceiling from $3,000 to $10,000, an action taken in the light of modern considerations with regard to appropriate income. H. Rep. No. 888, 84th Cong., 1st Sess.; S. Rep. No. 1023, 84th

Cong., 1st Sess. The legislation also extended statutory disability benefits to veterans of military action in Korea. Interested government agencies, commenting on either or both of these purposes, gave their support to the statute. See Committee Reports, *supra*. With respect to the legislative history of the Act the brief in opposition relies on a question and answer which do not sustain the weight put on them. Properly construed, the quoted remark of Congressman Aspinall (Br. in Opp., 21) says no more than that the proposed legislation makes no change in existing law with respect to the right of Army reserve officers to dual compensation. The Congressman does not state approval of the Court of Claims decision herein or disapproval of the Government's past or present position on the issue.

b. The other alleged bit of "legislative history" on which respondents rely relates not to P. L. 239, but to an entirely different bill, H. R. 7049. H. R. 7049, 84th Cong., 1st Sess., is the culmination of an enormous effort, so far not successful, to codify Titles 10 and 32 of the Code, covering all laws relating to the Armed Forces and the National Guard. After eight years of effort, including extended hearings and vast amounts of drafting and conference work, the bill reached the floor of the House and an effort was being made to pass it on the consent calendar in late July, 1955. On July 30, 1955, Congressman

Willis, in charge of the bill, was confronted by a possible objection, based on a question by Mr. Haley as to the effect of the codification on the "* * * present law * * *" with regard to reserve officers' rights to draw retired pay without regard to the Economy Act of 1932.[8] The answer to this question, as with other questions which threatened a parliamentary situation sufficient to block consent action on the bill,[9] was an assurance that the proposed codification worked no change in substantive law. Such assurances were repeatedly and clearly given. For example, Congressman Willis stated (101 Cong. Rec. 11022–11023):

* * * * *

> It is purely and simply a codification of existing law and has been reported favor-

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[8] This, of course, was not a question that could be anticipated and was remote from the purpose of the codification.

[9] See, *e. g.*, the answer of Congressman Celler in connection with an objection based on an inquiry whether the proposed codification changed the law with regard to the sale of alcoholic beverages on military posts. Congressman Celler stated (101 Cong. Rec. 10581):

> Mr. CELLER. Mr. Speaker, will the gentleman withhold his objection for a moment? If we do not pass this today and it goes over until the next session, there will have to be another complete recodification. It would cost probably another $25,000 to do it. This is a very difficult task. We have been working on this codification, I am informed, for 8 years. I do hope the gentleman will not object. *There are no substantive changes in the law.* [Emphasis added.]

> ably by unanimous vote of the Committee on the Judiciary after consultation with the Committee on Armed Services and has been sponsored by the Department of Defense with the approval of the Bureau of the Budget.
>
> Please let me state as emphatically as I am able that this bill is not designed to make a single substantive change in existing law.
>
> As a matter of fact we have gone to the extreme of inserting in the bill a provision—section 50—that it is the legislative purpose to restate the existing law without substantive change. * * *

The committee report in connection with the legislation makes it plain that no intention can be attributed to the House, in connection with its consideration of the proposed codification, to approve or disapprove existing substantive law, let alone comment on and intervene in matters in the course of unfinished litigation. H. Rep. No. 970, 84th Cong., 1st Sess., pp. 8–10. Further, Section 50 (a) of the proposed codification specifically states: "In sections 1–49 of this Act, it is the legislative purpose to restate, without substantive change, the law replaced by those sections on the effective date of this Act."

Even if H. R. 7049 had become law, we submit that no weight could be given to the excerpt quoted in the brief in opposition (p. 21) in con-

nection with the problem presented in this case, in view of the above expressed firm purpose of Congress to avoid changes in existing substantive law. Mr. Willis appears not to have been concerned with Mr. Haley's interpretation of the law; he merely was reassuring him that whatever the law provided, it would not be changed. In fact, H. R. 7049 failed of enactment, never reaching the Senate. The emergence of the subject matter of this case as a possible objection to the consent calendar treatment was completely unexpected, as stated above. And the opportunity remains in the Senate or in either House at the next session, to put the matter straight if anyone has been misled as to the scope of the bill.

3. The other line of argument in the brief in opposition is a suggestion that inequality of treatment between regulars and reservists is intended (Br. in Opp., pp. 11–16). In support of this argument, respondents assert that, under P. L. 239, retired reservists can now receive up to $10,000 a year in combined civilian salary and retired pay whereas "* * * retired regulars in the same status can still receive nothing but retired pay because the Act of July 31, 1894, remains unchanged * * *" (Br. in Opp., 15–16). This is true only in the sense that regular Army officers retired for longevity and in receipt of retired pay in the amount of $2,500 or more per annum cannot, generally speaking, hold a civilian

position with the Government at all. Strictly, therefore, this prohibition, whether or not it be viewed as outmoded (see Br. in Opp., App. E, 29–31), is not part of the dual compensation problem with which this case is concerned. On the other hand, the limitation of the 1894 statute does not apply to a second and much larger group which is involved in this case, namely, regular Army officers retired not for longevity but for disability. Such regular Army officers are eligible for and do hold government positions in large numbers. It is this second and larger class as to which the decision below created an inequity. It should be noted that the increase in the statutory ceiling, from $3,000 to $10,000, applies to this group of regular Army officers as well as to reservists. And it is the principle of equality of treatment between the latter two groups with which the Government's petition was concerned.

Nor is the issue eliminated by the amendment raising the limitation from $3,000 to $10,000. The changed ceiling of P. L. 239 has no effect on the large number of cases already accrued. As to them, it is essential that this Court grant review if the error below is to be corrected. And apart from past cases, the same issue of inequality of treatment will arise in a very considerable number of future cases in view of increases both in retirement benefits and civilian compensation.

CONCLUSION

For the reasons set forth in the petition for certiorari and for the reasons set forth in this memorandum, it is respectfully urged that writs of certiorari should issue herein.

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